Teng Chang Khim v Suruhanjaya Pilihanraya, Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2-24-90-93
WAN ADNAN J
16 APRIL 1994

Constitutional Law — *Review of constituencies by Election Commission — Local enquiry held under Sch 13 of the Federal Constitution — Whether opposers had right to be representated by counsel — Federal Constitution Sch 13 s 6 — Commissions of Enquiry Act 1950 s 18*

Constitutional Law — *Review of constituencies by Election Commission — Local enquiry held under Sch 13 of the Federal Constitution — Discretion of Election Commission to allow opposers to be legally represented — Refusal to allow legal representation — Whether opposers denied the right to be heard — Federal Constiution Sch 13*

The defendant, the Election Commission, had proposed some recommendations affecting the Seputeh Parliamentary Constituency under art 113(2) of the Federal Constitution ('the Constitution') and were required to hold a local inquiry pursuant to ss 4 and 5 of Sch 13 of the Constitution ('the Schedule'). The plaintiff and other registered voters of the Seputeh Constituency signed a memorandum objecting to the proposed recommendations. The memorandum was submitted to the defendant who requested them to attend a local enquiry. The plaintiff attended the enquiry at the appointed time and place with his counsel and formally applied to the defendant to be represented by counsel but his application was turned down. Counsel for the plaintiff contended that the plaintiff had a legal right to be represented by counsel at the enquiry, relying on s 6 of the Schedule and s 18 of the Commissions of Enquiry Act 1950 ('the Act'). The plaintiff sought a declaration to that effect and a further declaration that the denial of the plaintiff's right to be represented rendered the proceedings null and void, unconstitutional and of no effect and thereby rendered the recommendations for review a nullity.

Held, dismissing the application:

(1) Section 18 of the Act speaks of the right under the Act of a person to be represented at the enquiry and has no application. Section 6 of the Schedule refers to the powers of the commissioners under the Act, which are mainly contained in s 8 of the Act, and not to the rights of persons implicated or concerned in the matter under enquiry under the Act. Therefore, the plaintiff could not rely on s 6 to claim that he had a legal right to be represented by counsel at an enquiry held under s 5 of the Schedule. As there is no provision in the Constitution, particularly the Schedule, which gives the plaintiff the right to be represented by counsel at the enquiry, he has no right to be legally represented.

(2) It was at the defendant's discretion whether or not to allow the plaintiff to be represented by counsel at the enquiry. Although the plaintiff did not allege improper exercise of discretion but contended that the defendant had no discretion at all in the matter, the court found that the defendant had exercised their discretion properly. Furthermore, the plaintiff was not denied a reasonable opportunity of being heard merely because his request to be represented by an advocate and solicitor was refused.

[Bahasa Malaysia summary

Defendan, Suruhanjaya Pilihanraya, telah mencadangkan beberapa perkara berkenaan dengan Bahagian Pilihanraya Parlimen Seputeh di bawah perkara 113(2) Perlembagaan Persekutuan ('Perlembagaan itu') dan dikehendaki mengadakan suatu siasatan tempatan di bawah ss 4 dan 5 Jadual 13 Perlembagaan itu ('Jadual itu'). Plaintif dan pengundi berdaftar yang lain, Bahagian Pilihanraya Seputeh telah menandatangani suatu memorandum untuk membuat bantahan terhadap cadangan itu. Memorandum itu telah diserahkan kepada defendan yang telah meminta mereka menghadiri suatu siasatan tempatan. Plaintif telah menghadiri siasatan itu pada masa dan tempat yang ditetapkan dengan peguambelanya dan telah memohon secara rasmi kepada defendan supaya dapat diwakili oleh peguambela tetapi permohonannya telah ditolak. Peguambela pihak plaintif menegaskan bahawa plaintif mempunyai hak di sisi undang-undang supaya diwakili oleh peguambelanya di siasatan itu, bergantung kepada s 6 Jadual itu dan s 18 Akta Suruhanjaya Siasatan 1950 ('Akta itu'). Plaintif telah memohon suatu deklarasi sedemikian dan suatu deklarasi lanjutan bahawa penafian hak plaintif untuk diwakili menjadikan prosiding itu tidak sah dan terbatal, tidak berperlembagaan dan tidak berkesan dan oleh itu menjadikan cadangan untuk kajian semula itu tidak sah.

Diputuskan, menolak permohonan itu:

(1) Seksyen 18 Akta itu menyatakan hak seseorang di bawah Akta itu untuk diwakili di siasatan itu dan tidak terpakai di sini. Seksyen 6 Jadual itu merujuk kepada kuasa-kuasa pesuruhjaya di bawah Akta itu, yang kebanyakannya terkandung di dalam s 8 Akta itu, dan bukan kepada hak orang yang terbabit atau berkenaan dengan perkara yang disiasat di bawah Akta itu. Oleh itu, plaintif tidak boleh bergantung kepada s 6 untuk menuntut bahawa beliau mempunyai hak di sisi undang-undang untuk diwakili oleh peguambela di suatu siasatan yang diadakan di bawah s 5 Jadual itu. Oleh kerana tidak ada peruntukan di dalam Perlembagaan, terutamanya Jadual itu, yang memberikan plaintif hak untuk diwakili oleh peguambela di siasatan itu, beliau tidak mempunyai hak untuk diwakili secara guaman.

(2) Terpulanglah kepada budi bicara defendan sama ada membenarkan plaintif diwakili oleh peguambela atau tidak di siasatan itu. Walaupun plaintif tidak mengatakan terdapat penggunaan budi bicara secara tidak wajar tetapi menegaskan

bahawa defendan tidak mempunyai budi bicara sama sekali di dalam perkara itu, mahkamah berpendapat bahawa defendan telah menggunakan budi bicaranya dengan wajar. Lebih-lebih lagi, plaintif tidak dinafikan peluang yang munasabah untuk didengar semata-matanya kerana permohonannya untuk diwakili oleh seorang peguambela dan peguamcara telah ditolak.]

Cases referred to

1 *Enderby Town Football Club Ltd v Football Association Ltd* [1970] 3 WLR 1021; [1971] Ch 591; [1971] 1 All ER 215 (folld)
2 *Sithambaran v A-G* [1972] 2 MLJ 175 (folld)
3 *VC Jacob v A-G* [1970] 2 MLJ 133 (folld)

Legislation referred to

Commissions of Enquiry Act 1950 s 18
Federal Constitution Sch 13 Pt II ss 4, 5

Karpal Singh (*Karpal Singh & Co*) for the plaintiff.
Noraini bte Abdul Rahman (Senior Federal Counsel) for the defendant.

Wan Adnan J: By this summons the plaintiff seeks the following:

(1) a declaration the plaintiff had a legal right to be represented by an advocate and solicitor at the local enquiry held at the Bilek Gerakan, Suruhanjaya Pilihanraya Malaysia, Paras 8, Menara Bank Pembangunan, Kuala Lumpur on 25 October 1993 in respect of Bahagian Pilihanraya Parlimen P101 Seputeh Dalam Negeri Wilayah Persekutuan, Kuala Lumpur; and

(2) a declaration the denial by the defendant in allowing the plaintiff to be represented by an advocate and solicitor at the said enquiry has rendered the proceedings null and void, unconstitutional and of no effect thereby rendering the recommendations for parliamentary and state constituencies in the States of Malaya as reviewed by the defendant in 1993 a nullity.

The facts are not in dispute.

The plaintiff is a political secretary to the Dewan Rakyat opposition leader, Mr Lim Kit Siang, and a registered voter of Seputeh Parliamentary Constituency P101.

Sections 4 and 5 of Pt II of the 13th Schedule to the Federal Constitution ('the said Schedule') provide as follows:

> 4 Where the Election Commission have provisionally determined to make recommendations under Clause (2) of Article 113 affecting any constituency, they shall inform the Speaker of the House of Representatives and the Prime Minister accordingly, and shall publish in the *Gazette* and in at least one newspaper circulating in the constituency a notice stating —
>
> (a) the effect of their proposed recommendations, and (except in a case where they propose to recommend that no alteration be made in respect of the constituency) that a copy of their recommendations is open to inspection at a specified place within the constituency; and

(b) that representations with respect to the proposed recommendations may be made to the Commission within one month after the publication of such notice, A

and the Commission shall take into consideration any representations duly made in accordance with any such notice.

5 Where, on the publication of the notice under section 4 of a proposed recommendation of the Election Commission for the alteration of any constituencies, the Commission receive any representation objecting to the proposed recommendations from — B

(a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or
(b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question, C

the Commission shall cause a local enquiry to be held in respect of those constituencies.

The notice as required by s 4 was published in the Gazette Jilid 37 No 15 Tambahan 2 dated 23 July 1993. Pursuant to s 4(b), the plaintiff and 122 D registered voters of the Seputeh Constituency signed a memorandum dated 17 August 1993 objecting to the proposed recommendations which affected the said constituency. The memorandum was submitted to the defendant. By letter dated 4 October 1993, the plaintiff and the other voters were requested by the defendant to attend a local enquiry to be held on 25 October E 1993 at 9.30am at the defendant's Bilik Gerakan at Menara Bank Pembangunan, Kuala Lumpur.

The plaintiff attended the enquiry at the appointed time and place with his counsel. He formally applied to the defendant to be represented by counsel but his application was turned down.

The learned counsel for the plaintiff contends that the plaintiff has a F legal right to be represented by counsel at the enquiry. The defendant has no power to deny the plaintiff's right. He relies for his contention on the provisions of s 6 of the said Schedule and s 18 of the Commissions of Enquiry Act 1950 ('the Act').

Section 6 of the said Schedule provides as follows:

G

In relation to any enquiry held under section 5 the Election Commission shall have all the powers conferred on Commissioners by the Commissions of Enquiry Act 1950.

Section 18 of the Act provides as follows:

Any person whose conduct is the subject of enquiry under this Act, or who is in H any way implicated or concerned in the matter under enquiry, shall be entitled to be represented by an advocate at the whole of the enquiry; ...

By virtue of s 6 of the said Schedule, the defendant became vested 'with all the powers conferred on Commissioners ...'. Only powers are vested. What are the powers of the commissioners under the Act? They are mainly those I in s 8 of the Act. Section 18 has no application. This section speaks of the right to be represented by counsel of a person at the enquiry under the Act. Section 6 refers to the powers of the commissioners under the Act and not

A to the rights of persons implicated or concerned in the matter under enquiry under the Act. Therefore the plaintiff cannot rely on this section to claim that he has a legal right to be represented by counsel at an enquiry held under s 5 of the said Schedule.

As there is no provision in the Federal Constitution, particularly the said Schedule, which gives the plaintiff the right to be represented by counsel at B the enquiry, I find that he has no right to be legally represented.

In *Enderby Town Football Club Ltd v Football Association Ltd*,[1] Lord Denning MR said [at p 1025]:

> The case thus raises this important point: Is a party who is charged before a domestic tribunal, entitled as of right to be legally represented? Much depends C on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal. They are masters of their own procedure: and, if they, in the proper exercise of their discretion, decline to allow legal representation, the courts will not interfere.

D This principle was adopted in the Singapore case of *Sithambaran v A-G*.[2]

It is my view that it is at the discretion of the defendant whether or not to allow the plaintiff to be represented by counsel at the enquiry. If the discretion has been properly exercised the court will not interfere.

The plaintiff does not allege improper exercise of discretion as his E contention is that the defendant has no discretion at all in the matter. Be that as it may, I find that the defendant had exercised their discretion properly.

Datuk Hj Abdul Rashid bin Hj Abdul Rahman, the secretary of the defendant in the affidavit-in-reply (encl 10) said in para 4 as follows:

F > Defendan tidak menafikan bahawa plaintif ada membuat permohonan secara lisan untuk diwakili oleh seorang peguam. Walau bagaimanapun setelah menimbang permohonan plaintif, defendan berpendapat bahawa plaintif tidak perlu diwakili oleh peguam.

And at para 6 he said:

G > Defendan selanjutnya menyatakan bahawa plaintif telah dapat menyampaikan penghujahan dengan baik dan jelas ketika merujuk kepada bantahan dan cadangan bertulis beliau (eks TCK–4) semasa representasi tersebut.

I also find that the plaintiff was not denied a reasonable opportunity of being heard. The document (exh TCK–4) containing his objections and H proposals which he submitted to the defendant at the enquiry was quite comprehensive. I agree with Wee Chong Jin CJ when he said in *VC Jacob v A-G*[3] [at p 136], '... the committee of inquiry has not denied the plaintiff a reasonable opportunity of being heard merely because it has refused the plaintiff's request to be represented before it by an advocate and solicitor'.

I dismissed the plaintiff's application with costs.

I *Application dismissed.*

Reported by Anne Khoo